

State of California
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation

FINAL STATEMENT OF REASONS

Subject Matter:

Workers' Compensation – Supplemental Job Displacement Benefit

Title 8, California Code of Regulations, sections 10133.50 through 10133.60

The Administrative Director of the Division of Workers' Compensation, pursuant to the authority granted by Labor Code Sections 133, 4658.5, and 5307.3, has adopted Article 7.5 of Chapter 4.5, Subchapter 1, of Title 8, California Code of Regulations, commencing with Section 10133.50:

Section 10133.50	Definitions
Section 10133.51	Notice of Potential Right to Supplemental Job Displacement Benefit
Section 10133.52	"Notice of Potential Right to Supplemental Job Displacement Benefit Form"
Section 10133.53	Form DWC-AD 10133.53 "Notice of Offer of Modified or Alternative Work for Injuries Occurring on or after 1/1/04"
Section 10133.54	Dispute Resolution
Section 10133.55	Form DWC-AD 10133.55 "Request for Dispute Resolution before the Administrative Director"
Section 10133.56	Requirement to Issue Supplemental Job Displacement Nontransferable Training Voucher
Section 10133.57	Form DWC-AD 10133.57 "Supplemental Job Displacement Nontransferable Training Voucher Form"
Section 10133.58	State Approved or Accredited Schools
Section 10133.59	The Administrative Director's List of Vocational Return to Work Counselors
Section 10133.60	Termination of Claims Administrator's Liability for the Supplemental Job Displacement Benefit

UPDATE OF INITIAL STATEMENT OF REASONS AND INFORMATIVE DIGEST

As authorized by Government Code §11346.9(d), the Administrative Director incorporates the Initial Statement of Reasons prepared in this matter. There have been no changes to the statutes directly relating to this rulemaking.

The proposed regulation changes are summarized below.

THE FOLLOWING SECTIONS WERE AMENDED FOLLOWING THE PUBLIC HEARING AND CIRCULATED FOR A FIRST 15-DAY COMMENT PERIOD (February 16, 2005 - March 3, 2005.)

1. Section 10133.50 Definitions

The definitions of “alternative work” and “modified work” were changed to comply with Labor Code section 4658.1. The definition of “parties” was amended to include “the employer.” The definition of “regular work” was added to comply with the definition in Labor Code section 4658.1. The definition for “regular position” was deleted because AB 277 repealed prior Labor Code section 139.5 which referred to “regular position.” The reference to Labor Code section 4658.1 was also added.

2. Section 10133.51 Notice of Potential Right to Supplemental Job Displacement Benefit

This section was modified to include the phrase “if not previously provided,” so that the claims administrator will be required to send the Notice only one time. Additionally, the section was reorganized for clarity and syntax.

3. Section 10133.52 “Notice of Potential Right to Supplemental Job Displacement Benefit Form”

This mandatory form was modified by adding the words, “and your employer or the claims administrator has not provided you with a Notice of Offer of Modified or Alternative Work as described below,” in order to have all of the eligibility conditions included in the first paragraph. In the third paragraph, the word “determined” was replaced by “issued” for clarity. The following sentences were also added to the third paragraph: “You may also settle your entitlement to a voucher as part of a compromise and release settlement for a lump sum payment. Any settlement must be reviewed and approved by a Workers’ Compensation Administrative Law Judge.” These sentences were added to advise the employee that the benefit may be settled.

The former fifth paragraph was replaced, as the former paragraph advised the employee that if he or she were eligible, the employee would receive the voucher once the claims administrator began paying permanent disability payments. The section has been changed to comply with Labor Code section 4658.1 which states that the amount of the voucher is based on the permanent partial disability award. The new language states: “If you are eligible, and you have not already settled the benefit, you will receive the voucher from your employer or the claims administrator within 25 calendar days from the date the permanent partial disability award is issued by the Workers’ Compensation Administrative Law Judge or the Workers’ Compensation Appeals Board.”

The note stating that the employee must use the voucher within 5 years of the date of injury was removed as Labor Code section 5604 applies only to the collection of benefits commencing with section 4700.

In the second bulleted paragraph on page two, “within 15 percent” is replaced with “at least 85 percent” for clarity and to be in conformity with Labor Code section 4658.1 (b) and (c).

The words “claims administrator” were added to the next paragraph for clarity and the word “employer” was replaced with the word “offer” also for clarity.

Reference to section 10133.54 was changed to 10133.55 as the numbering has been changed. The form also was modified to include a statement that the employee may contact the claims administrator or information and assistance officer for more information. A line for the claims administrator’s email address was added.

4. Section 10133.53 Form DWC-AD 10133.53 “Notice of Offer of Modified or Alternative Work for Injuries Occurring on or after 1/1/04”

This mandatory two-page form was modified to reflect Labor Code section 4658.1’s definitions of modified and alternative work. The sentence “Regardless of whether you accept or reject this offer, your permanent disability award may be decreased by 15%” was added. This sentence was added to comply with Labor Code section 4658 and because this form may also be used by employees offering alternative or modified work pursuant to Labor Code section 4658. The word “this” is replaced with “the attached” for clarity. The reference to 10133.54 was changed to 10133.55. On page two, “within 15%” is replaced with “at least 85%” to be in conformity with the notice on page one and with Labor Code section 4658.1 (b) and (c). On page two, “more than” is replaced with “at least” to comply with the statutory language. A section requesting information regarding the permanent and stationary date, whether the permanent and stationary status was determined by a doctor’s report or the Findings and Award, and the date of the last payment of Temporary Total Disability was added so that the parties will be able to confirm that the appropriate timeframes have been met with regard to the offers of modified and alternative work. Page numbers were added so that the parties will know that it is a two-page form. Labor Code sections 4658, 4658.1 and 4658.6 were added as references.

5. Section 10133.54 Dispute Resolution

This section was added to provide a procedure to follow if there is a dispute about the supplemental job displacement benefit. Either party may submit the completed form DWC-AD 10133.55 to the Administrative Director who will issue a determination and order.

6. Section 10133.55 Form DWC-AD 10133.55 “Request for Dispute Resolution before the Administrative Director”

This section has been renumbered. “If applicable” has been added to the line following the request for the counselor’s name. A proof of service section has been added so that the parties and the Administrative Director will know the date the Request was mailed.

7. Section 10133.56 Requirement to Issue Supplemental Job Displacement Nontransferable Training Voucher

This section and references to other sections have been renumbered. The reference to “30 days from the date that the employer has commenced permanent disability payments” has been replaced with “25 calendar days from the issuance of the permanent partial disability award by the Workers’ Compensation Administrative Law Judge or the Workers’ Compensation Appeals Board.” The change was made to comply with Labor Code section 4658.5. Twenty five days

was chosen to allow a party twenty days to file an appeal plus five days for mailing. Former subdivision (c) was removed as the voucher will be based on the final award amount. The subsequent subdivisions were renumbered. New subdivision (c) was amended to include “claims administrator.” The numerical reference to the voucher was corrected to reflect the renumbering of the sections. Subdivision (g) was added to state: “The employer or claims administrator shall issue the reimbursement payments to the employee or direct payments to the VRTWC and the training providers within 45 calendar days from receipt of the completed voucher, receipts and documentation.”

8. Section 10133.57 Form DWC-AD 10133.57 “Supplemental Job Displacement Nontransferable Training Voucher”

This section has been renumbered. In the first paragraph, the words “Supplemental Job Displacement Benefit” were removed in order to make the sentence more readable. The phrase, “If you decide to voluntarily withdraw from a program, you may not be entitled to a full refund of the voucher amount utilized,” has been added in response to a comment. The sentence stating that the employee must use the voucher within 5 years of the date of injury was removed as Labor Code section 5604 applies only to the collection of benefits commencing with section 4700. The word “employer” was added next to the words “or claims administrator” in two places on the first page and one place on page two for clarity.

The words “per claims administrator’s estimate of permanent disability or C&R or Award” have been removed to comply with Labor Code section 4658.5. The phrase, “attach additional pages for each provided is necessary,” has been added as an employee may utilize more than one provider.

9. Section 10133.58 State Approved or Accredited Schools

This section has been renumbered. The website for the Bureau of Private Postsecondary and Vocational Education has been added. The sentences have been re-structured for clarity and syntax.

10. Section 10133.59 The Administrative Director’s List of Vocational Return to Work Counselors

This section has been renumbered. The department’s website, which will have a list of Vocational & Return to Work Counselors, has been added. Subdivision (b) has been amended to include the phrase: “to facilitate an employee’s vocational training or return to work in connection with the Supplemental Job Disability Benefit set forth in this Article,” for clarity. Subdivision (c) was amended to include: “However, a claims administrator shall provide a VRTWC with any medical reports, including permanent and stationary medical reports, upon an employee’s written request and a signed release waiver.” The word “worker” was replaced with “employee” to be consistent.

11. Section 10133.60 Termination of Employer’s Liability for the Supplemental Job Displacement Benefit

This section has been renumbered. “The claims administrator” was added to the section to clarify that both the employer’s and the claims administrator’s liability ends if the itemized circumstances occur. Subdivision (a)(6) was reworded for clarity. Some words were replaced for syntax purposes. Reference to Labor Code section 4658.1 was added.

THE FOLLOWING SECTIONS WERE AMENDED FOLLOWING THE COMMENT PERIOD ENDING APRIL 8, 2005 AND CIRCULATED FOR A SECOND 15-DAY COMMENT PERIOD (March 24, 2005 – April 8, 2005)

1. Section 10133.50 Definitions

The definitions of “(5) Employer offer” was deleted and re-named “(10) Offer of Modified or Alternative Work” in order to be consistent with the use of the terms in the regulations. The subdivisions were renumbered to accommodate the change in the order. The word “employer” was deleted from the definitions for “Notice” and “Parties” because the definition of “claims administrator” includes self-insured, self-administered employers. The definition for “(12) Permanent Partial Disability Award” was modified for clarity.

2. Section 10133.51 Notice of Potential Right to Supplemental Job Displacement Benefit

The word “employer” was deleted from this section because the definition of “claims administrator” includes self-insured, self-administered employers.

3. Section 10133.52 “Notice of Potential Right to Supplemental Job Displacement Benefit” Form

The word “employer” was deleted throughout this section because the definition of “claims administrator” includes self-insured, self-administered employers. The phrase “which prevented you from returning...” was added to clarify that the employee must be off work due to his or her disability as opposed to his or her choice. The word “entitlement” was replaced with “potential eligibility” to clarify that the employee is not settling the voucher, but has the right to settle the potential eligibility to the voucher.

The phrase “A list of vocational return to work counselors (VRTWCs) is available on the Division of Workers’ Compensation’s website www.dir.ca.gov or upon request” was added to the Notice so that the injured worker will know how to access information regarding VRTWCs. The two bulleted statements on page two pertaining to modified and alternative work were deleted. Instead, there is one list of the requirements for both modified and alternative work, which is consistent with the requirements listed in section 10133.53 and Labor Code section 4658.1.

4. Section 10133.53 Form DWC-AD 10133.53 “Notice of Offer of Modified or Alternative Work for Injuries Occurring on or after 1/1/04”

The title of this section was modified by adding the word “Offer” to match the name of the form. The word “employer” was deleted from top sentence on the form because the definition of

“claims administrator” includes self-insured, self-administered employers. The words “the remainder of” and “payments” were added to the sentence advising that the permanent disability payments may be decreased by 15%. These changes were made to more accurately reflect the effect of Labor Code section 4658.

On the second page of the form, the lines for information concerning the Permanent and Stationary date and the date of the Findings and Award were deleted, as the Notice of Offer or Modified or Alternative Work will occur prior to these dates. The line for “Doctor’s name” was modified to state “Name of doctor who approved job restrictions (optional)” for clarity. If a doctor has approved job restrictions, it will assist all parties to be able to refer to the report and will help reduce disputes regarding whether the offer is medically appropriate.

5. Section 10133.54 Dispute Resolution

The word “employer” was deleted from this section because the definition of “claims administrator” includes self-insured, self-administered employers. Grammatical errors were corrected in subdivisions (a), (b)(5) and (e). Subdivision (f) was re-worded for clarity.

6. Section 10133.56 Requirement to Issue Supplemental Job Displacement Nontransferable Training Voucher

Subdivisions (a) and (b) were re-written to clarify that a seasonal employee is entitled to the benefit if the work season has ended during the 60 days that the injured worker was off work because of his or her permanent partial disability. The first line in subdivision (c) was modified by the introductory line, “When the requirements under subdivision (a) have been met.”

7. Section 10133.57 Form DWC-AD 10133.57 “Supplemental Job Displacement Nontransferable Training Voucher”

The word “employer” was deleted from this section because the definition of “claims administrator” includes self-insured, self-administered employers. The phrase “A list of Vocational & Return to Work Counselors (VRTWCs) is available on the Division of Workers’ Compensation’s website www.dir.ca.gov or upon request” was added to the Voucher so that the injured worker will know how to access information regarding VRTWCs. The sentence advising the employee which numbers to complete was corrected by changing the number from “18” to “19” and removing the number “20” from the signature line.

8. Section 10133.58 State Approved or Accredited Schools

Subdivision (b) was re-worded for better syntax.

9. Section 10133.60 Termination of Employer’s Liability for the Supplemental Job Displacement Benefit

The word “employer” was deleted from this section because the definition of “claims administrator” includes self-insured, self-administered employers. Subdivision (a)(4) was

clarified by adding the words “of seasonal work.” Subdivision (a)(5) was deleted because Labor Code section 5410 does not bar the supplemental job displacement benefit and therefore the reference to the section was confusing. Subdivision (a)(6) was renumbered, and the words “and applicable law” were deleted for clarity.

THE FOLLOWING NON-SUBSTANTIVE / CORRECTIONS WITHOUT REGULATORY EFFECT WERE MADE TO THE TEXT OF THE REGULATIONS AFTER THE CLOSE OF THE FINAL COMMENT PERIOD

1. Section 10133.51 Notice of Potential Right to Supplemental Job Displacement Benefit

The title is corrected from “Notice of Potential Right to Supplemental Job Displacement Benefits” to “Notice of Potential Right to Supplemental Job Displacement Benefit.” The word “benefit” is singular throughout these regulations, but was plural in the title. This correction makes the title of the section conform to the rest of the regulations.

2. Section 10133.52 “Notice of Potential Right to Supplemental Job Displacement Benefit Form”

The sentence “The claims administrator will ~~not~~ be required to pay for supplemental benefits if the offer for modified or alternative work meets the following conditions...” is corrected by reinserting the word “not.” When the section was modified by removing the words “Neither your employer nor”, the word “not” (which had previously been stricken) was inadvertently omitted. The failure to reinsert “not” was a syntax error. Without the correction, the section is contradictory to Labor Code section 4658.6 and regulation sections 10133.53 and 10133.56.

3. Section 10133.53 Form DWC-AD 10133.53 “Notice of Offer of Modified or Alternative Work for Injuries Occurring on or after 1/1/04”

The claims administrator is required to send the form to the Administrative Director; however, the form did not list the mailing address. The address has been added to the first page in the section “Notice to the Parties.”

4. Section 10133.55 Form DWC-AD 10133.55 “Request for Dispute Resolution before the Administrative Director”

The parties are required to send the form to the Administrative Director; however, the form did not list the mailing address. The address has been added to the first page in the section “Proof of Service.” Additionally, section 10133.54 instructs the parties to attach all pertinent documents to the form; however, the form does not indicate this instruction. Therefore, the words, “and attach all pertinent documents” have been added to the section “The Administrative Director is requested to resolve the following dispute...”

6. Section 10133.56 Requirement to Issue Supplemental Job Displacement Nontransferable Training Voucher

The first section in subdivision (a) mistakenly contained the word “Disability.” It has been stricken so that the sentence now correctly reads “The employee shall be eligible for the Supplemental Job Displacement Benefit when:”

In subdivision (b) there was a typographical error. The word “in” should have been “is.” The sentence has been corrected to state “In the case of a seasonal employee, where the employee is unable to return to...”

7. Section 10133.59 The Administrative Director’s List of Vocational Return to Work Counselors

Subdivision (b) is corrected to state “Supplemental Job Displacement Benefit” instead of “Supplemental Job Disability Benefit.”

8. Section 10133.60 Termination of Employer’s Liability for the Supplemental Job Displacement Benefit

One syntax error has been corrected. Subdivision (a) addresses the issue of when the claims administrator’s liability to provide the voucher “shall end.” Subdivision (a) (3) has been corrected by deleting the words, “the claims administrator is not required to provide supplemental job displacement benefit,” because the phrase was redundant.

UPDATE OF MATERIAL RELIED UPON / DOCUMENTS ADDED TO RULEMAKING FILE

In addition to the documents identified in the Initial Statement of Reasons the following documents were relied upon by the Division and were made available to the public as required by Government Code Section 11347.1.

Title of Document Added to Rulemaking File	Dates of Availability for Public Comment
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Comments received by the Division of Workers’ Compensation concerning the Division’s proposed changes.	May 21, 2005 - July 8, 2005. February 16, 2005 - March 3, 2005 March 24, 2005 - April 8, 2005
Pre-Notice comments from DWC Forum	January 27, 2004 - February 13, 2004

LOCAL MANDATES DETERMINATION

- Local Mandate: None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district. The proposed amendments do not apply to any local agency or school district.
- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None. The proposed amendments do not apply to any local agency or school district.
- Other nondiscretionary costs/savings imposed upon local agencies: None. The proposed amendments do not apply to any local agency or school district.

CONSIDERATION OF ALTERNATIVES

The Division considered all comments submitted during the public comment periods, and made modifications based on those comments to the regulations as initially proposed. The Administrative Director has now determined that no alternatives proposed by the regulated public or otherwise considered by the Division of Workers' Compensation would be more effective in carrying out the purpose for which these regulations were proposed, nor would they be as effective and less burdensome to affected private persons and businesses than the regulations that were adopted.

SUMMARY OF COMMENTS RECEIVED AND RESPONSES THERETO CONCERNING THE REGULATIONS ADOPTED

The comments of each organization or individual are addressed in the following charts.

The public comment period was as follows:

Initial 45-day comment period on proposed regulations:

May 21, 2005 through July 8, 2005.

First 15-day comment period on modifications to proposed text:

February 16, 2005 - March 3, 2005.

Second 15-day comment period on modifications to proposed text:

March 24, 2005 – April 8, 2005